United States Court of Appeals for the Second Circuit



APPENDIX

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Rose Davis, An Individual,

Petitioner,

 \bigvee .

Docket No. 76-4039

National Labor Relations Board,

Respondent.

Petitioner's Appendix
To Brief

B/s

Rose Davis, An Individual, 380 Front Street Hempstead, New York 11550



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CHRONOLOGICAL LIST OF RELEVANT DOCKET ENTRIES

CHRONOLOGICAL LIST OF RELEVANT DOCKET ENTRIES

In the Matter of: Rose Davis, An Individual

Case No.: 29-CA-4088

11. 7.74	Charge filed
1.31.75	Complaint and Notice of Hearing, dated
2.12.75	Employer's Answer to complaint, received
2.28.75	Order Amending Complaint, dated
3.19.75	Hearing opened
3.21.75	Hearing closed
7.23.75	Administrative Law Judge's Decision issued
8.13.75	Petitioner's motion for re-hearing and to re-open the record and exceptions to the Administrative Law Judge's Decision, received
8.15.75	Petitioner's motion for rehearing, received
8.15.75	General Counsel's Exceptions to the Decision of the Administrative Law Judge, received
1.20.76	Decision and Order issued by the National Labor Relations Board

NOTICE OF COMPLAINT AND HEARING

UNITED STATES OF AMERICA BEFORE THE NATIONAL LABOR RELATIONS BOARD REGION 29

CADDELL-BURNS MFG. CO., INC.

and

Case No. 29-CA-4088

ROSE DAVIS, An Individual

COMPLAINT AND NOTICE OF HEARING

It having been charged by Rose Davis, an individual that Caddell-Burns Manufacturing Co., Inc., herein called Respondent, has engaged in, and is engaging in, certain unfair labor practices affecting commerce as set forth and defined in the National Labor Relations Act, as amended, 29 U.S.C., Sec. 151, et seq., herein called the Act, the General Counsel of the National Labor Relations Board, herein called the Board, on behalf of the Board, by the undersigned Regional Director for Region 29, pursuant to Section 10(b) of the Act and the Board's Rules and Regulations - Series 8, as amended, Section 102.15, hereby issues this Complaint and Notice of Hearing and alleges as follows:

- 1. The Charge in this proceeding was filed by Rose Davis on November 7, 1974 and served by registered mail upon Respondent on or about November 8, 1 1974.
- 2. (a) Respondent is and has been at all times material herein a corporation duly organized under, and existing by virtue, of, the laws of the State of New York.
- (b) At all times material herein Respondent has maintained its principal office and place of business at 40 East 2nd Street, in the City of Mineola, County of Nassau, State of New York, where it is, and has been at all times material herein, engaged in the manufacture, sale and distribution of electronic components and related products.

- (d) Respondent is and has been at all times material herein an employer engaged in commerce within the meaning of Section 2(2), (6) and (7) of the Act.
- 3. The International Industrial Production Employees Union herein called the Union, is and has been at all times material herein a labor organization within the meaning of Section 2(5) of the Act.
- 4. Sidney Burns, Vincent Burns, and Thomas Burns are, and have been at all times material herein, the president, treasurer, and secretary, respectively, of Respondent, acting on its behalf, and agents thereof.
- 5. On or about September 10, 1974 and on various other dates presently winknown during the months of September and October, 1974, Respondent by Thomas Burns, its Secretary and agent, and by other agents and supervisors presently unknown, informed, advised or announced to its employees that it was withholding wage increases and other benefits and improvements in their terms and conditions of employment and that it could not grant such wage increases and other benefits and improvements in their working conditions because the Union was engaged in organizational activities among said employees.
 - 6. On or about October 20, 1974 and on various other dates presently unknown during the month of Cotober, 1974, Respondent by Thomas Burns, its Secretary and agent, and by other agents and supervisors presently unknown, offered, and promised to its employees wage increases, and other benefits and improvements in their working conditions and terms of employment to induce them to refrain from becoming or remaining members of the Union, and to

refrain from giving any assistance or support to it, and to induce them to abandon their membership in and activity on its hehalf.

- 7. From on or about June 10, 1974 to on or about November 8, 1974
 Respondent assisgned its employee Rose Davis to more arduous and less agreeable job tasks and thereafter required her to continue to perform such job tasks and Respondent harrassed its employee Rose Davis, thereby forcing her to quit her employment with Respondent on or about November 12, 1974.
- 8. On or about November 12, 1974, Respondent discharged its employee, Rose Davis by engaging in the conduct described in paragraph 7 above.
- 9. Since the date of the discharge of its employee, Rose Davis, as described above in paragraph 8, Respondent has failed and refused to reinstate, or offer to reinstate, said employee to her former or substantially equivalent position of employment.
- 10. Respondent engaged in the conduct as described above in paragraphs 7, 8, and 9, because said employee joined and assisted the Union and engaged in other concerted activity for the purpose of collective bargaining and mutual aid and protection.
- 11. By the acts described above in paragraphs 5 through 10 and by each of said acts, Respondent interfered with, restrained and coerced, and is interfering with, restraining and coercing its employees in the exercise of the rights guaranteed in Section 7 of the Act, and thereby engaged in and 1s engaging in unfair labor practices affecting commerce within the meaning of Section 8(a)(1) and Section 2(6) and (7) of the Act.
- 12. By the acts described above in paragraphs 7 through 10 and by each of said acts, Respondent discriminated and is discriminating in regard to the hire and tenure and terms and conditions of employment of its employees, thereby discouraging membership in a labor organization, and thereby engaged in and is engaging in unfair labor practices affecting commerce within the meaning of Section 8(a)(3) and Section 2(6) and (7) of the Act.

13. The acts of Respondent described above in paragraphs 5 through 10 occurring in connection with the operations of Respondent, described above in paragraph 2 have a close, intimate, and substantial relation to trade, traffic, and commerce among the several States and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

PLEASE TAKE NOTICE that on the 19th day of March, 1975 at 10:00 A.M., at 16 Court Street, Fourth Floor, in the Borough of Brooklyn, in the City and State of New York and consecutive days thereafter until concluded, a hearing will be conducted before a duly designated Administrative Law Judge of the National Labor Relations Board on the allegations set forth in the above Complaint, at which time and place you will have the right to appear in person, or otherwise, and give testimony. Form NLRB-4668, Statement of Standard Procedures In Formal Hearings Held Before The National Labor Relations Board in Unfair Labor Practices Cases, is attached.

You are further notified that, pursuant to Sections 102.20 and 102.21 of the Board's Rules and Regulations, the Respondent shall file with the undersigned Regional Director, acting in this matter as agent of the National Labor Relations Board, an original and four (4) copies of an answer to the said Complaint within ten (10) days from the service thereof, and that unless it does so all the allegations in the Complaint shall be deemed to be admitted by it to be true and may be so found by the Board. Immediately upon the filling of its answer, Respondent shall serve a copy thereof on each of the other parties.

Dated at Brooklyn, New York this 31st day of January, 1975.

Samuel M. Kaynard Regional Director

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National Labor Relations Board

Region 29

16 Court Street

Brooklyn: New York 11241

ANSWER TO COMPLAINT

UNITED STATES OF AMERICA BEFORE THE NATIONAL LABOR RELATIONS BOARD REGION 29

CADDELL-BURNS MFG. CO., INC.

and

ROSE DAVIS, An Individual

ANSWER

FIRST DEFENSE

Respondent admits the allegations contained in paragraph 1, 2, 3, and 4 of the complaint.

SECOND DEFENSE

Respondent denies each and every allegation contained in paragraphs 5, 6, 7, 8, 9, 10, 11, 12, and 13 of the complaint.

WHEREFORE, respondent demands:

- 1. That the complaint be dismissed.
- Such other and further relief as the Regional
 Director or the National Labor Relations Board may deem just and proper.

Dated: February 10, 1975.

DAVID GOLDBERG

Attorney for Respondent

999 Central Avenue

Woodmere, New York 11598

(516) 374 4694

ORDER AMENDING COMPLAINT

UNITED STATES OF AMERICA BEFORE THE NATIONAL LABOR RELATIONS BOAPD REGION 29

CADDELL-BURNS MFG. CO., INC.

and

Case No. 29-CA-4088

ROSE DAVIS, An Individual

ORDER AMENDING COMPLAINT

It is hereby ordered that the Complaint issued on January 31, 1975 in the above-captioned case be amended as follows:

Delete the paragraph numbered "6" and substitute therefor the following:

- 6. (a) On or about October 20, 1974, and on various other dates presently unknown during the month of October 1974, Respondent, by Thomas Burns, its scretary and agent, and by other agents and supervisors presently unknown, offered and promised to its employees wage increases and other benefits and improvements in their working conditions and terms of employment to induce them to refrain from becoming or remaining members of the Union, and to refrain from giving any assistance or support to it, and to induce them to abandon their membership in and activity on its behalf.
- (b) On or about October 16 and 17, 1974, Respondent, by its agent, offered severance pay and other benefits to its employees in order to induce them voluntarily to quit their employment with Respondent, because said employees had joined and assisted the Union and engaged in other concerted activity for the purpose of collective bargaining and mutual aid and protection.

Dated at Brooklyn, New York, this 28th day of February, 1975.

Samuel M. Kaynard

Regional Director, Region 29

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National Labor Relations Board

16 Court Street

Brooklyn, New York 11241

ADMINISTRATIVE LAW JUDGE'S DECISION

UNITED STATES OF AMERICA BEFORE THE NATIONAL LABOR RELATIONS BOARD DIVISION OF JUDGES WASHINGTON, D.C.

CADDELL-BURNS MFG. CO., INC.

Respondent

and

Case No. 29-CA-4088

ROSE DAVIS, An Individual

Charging Party

Steven Davis, Esq., for the General Counsel.

David Goldberg, Esq., and Henry Goldberg, Esq., Woodmere, N.Y., for the Respondent.

DECISION

Statement of the Case

SIDNEY J. BARBAN, Administrative Law Judge: This matter was heard at Brooklyn, New York, on March 19, 20, and 21, 1975, upon a complaint issued on January 31, 1975, as thereafter amended, based upon a charge filed by the above-named Charging Party (herein "Davis") on November 7, 1974 (all dates herein are in 1974, unless otherwise stated). The complaint, as amended, alleges that the above-named Respondent (1) advised employees that it was withholding wage increases and benefits because of the organizational activities of International Industrial Production Employees Union (herein "the Union"), (2) promised employees wage increases and other benefits to induce them to refrain from becoming or remaining members of the Union or assisting it, (3) granted wage increases and other benefits to induce employees to refrain from becoming or remaining members of the Union or assisting it, (4) offered serverance pay and other benefits to employees who had

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joiner or assisted the Union to induce those employees to terminate their employment with Respondent, all in violation of Section 8(a)(1) of the Act, (5) assigned employee Davis to more arduous and less agreeable job tasks and harassed Davis causing her to quit her employment because of her Union activities, and (6) discharged Davis because of her Union activities.

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Respondent's answer denies the commission of the alleged unfair labor practices, but admits allegations of the complaint sufficient to justify the assertion of jurisdiction under current standards of the Board (Respondent, in the course of its manufacturing operations, in a recent annual period shipped products valued in excess of \$50,000 in interstate commerce from its plant at Mineola, New York), and to support a finding that the Union is a labor organization within the meaning of the Act.

Upon the entire record in this case, from observation of the witnesses and their demeanor, and after due consideration of the briefs filed by the General Counsel, and the Respondent, I make the following:

Findings and Conclusions

The following findings of fact are made upon careful study of the entire record. I shall not detail each conflict in the evidence and the reasons for the resolution of each. I have credited the testimony of Rose Davis for the most part because she impressed me as a credible witness. Evidence inconsistent with the following findings is not credited.

I. Summary of Facts and Issues

Union activity

Davis, who began her employment with Respondent in the early part of October, 1973, sought the assistance of the Union to organize Respondent's employees. Union representatives appeared in front of Respondent's plant on June 3, distributing leaflets. Respondent observed the prominent association of Davis and employee Loretta Blandon with these Union representatives. The following day Blandon was discharged. Davis protested to Respondent that it was she who had brought the Union in, not Blandon. Employees who had previously shown interest in the Union began to withdraw. Davis, feeling deserted by the employees in whose behalf she had acted, began to upbraid them and continued as a militant advocate for the Union. This alienated

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some of the employees. 1/ Some friends of Davis indicated that they were concerned about associating with her for fear of losing their jobs. As a result, from June until Davis' termination of employment in November, employees tended to have little association with her in the shop, although she does not seem to have had any arguments with the employees about the Union during the latter months of her employment.

Alleged harassment

Davis testified that beginning in June, she was assigned job tasks that she had never had to do before, jobs that were unpleasant and disagreeable, and put her under tension and pressure, and that she was not assigned to other jobs in which she was experienced. She further states that after the advent of the Union, Respondent began to criticize her tardiness, which it had never done before. Davis asserts that because of this harassment, considered in more detail hereinafter, she was forced to quit her employment with Respondent. The Respondent contends that the job assignments given to Davis were normal and were not discriminatory, and denies that there was any harassment of Davis.

Alleged inducement to quit

In mid-October, Davis attended a hearing before an Administrative Law Judge of the Board as a prospective witness upon a 25 complaint alleging the discriminatory discharge of Loretta Blandon. This complaint was settled during the course of the hearing. At the point when Blandon's case appeared settled, Respondent's counsel stated that they might now "take care of Mrs. Davis." At the suggestion of 30 the Judge the discussion was adjourned to another room. Union representative Garber accompanied Davis. There Respondent's counsel told Davis that Respondent did not want her "there," and asked, "What will it take for you not to go back to work." Counsel suggested that Respondent would give Davis 2 weeks pay and get her another job. Davis refused to offer and the discussion broke up. When Respondent's 35 counsel and Davis then passed Sidney Burns, Respondent's president,

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Respondent sought to show that during this period Davis threatened employees, used profane or abusive language to them, and slapped an employee. With the exception of Davis' conduct toward Catherine Gianetti (a long-time employee with special loyalties to Respondent), the alleged threats were to subpena employees to support Davis' position; no profane or abusive language was shown (Vicent Burns' testimony to the contrary is not credited). However, though Davis denied it, I am inclined to believe that, during an excited discussion on June 4, Davis did offer to slap one employee's face, but did not do so. Davis did offer to fight with Gianetti. During this period, she also made certain uncomplimentary remarks about members of management.

and Carmerine Gianetti standing together, Gianetti stated that she did not want Davis back at work. 2/ Counsel stated that he had done all he could, there was nothing more that he could do, that if Davis wished to come back to work, she should be permitted, and she should not be bothered. The next morning, counsel asked Davis if she had reconsidered the offer. She replied, in jest, that she would take a larger offer. This apparently was not forthcoming.

Respondent's counsel credibly testified that on two or three occasions during the hearing on the Blandon matter, Union representative Garber had spoken to him about Davis. Garber said that Davis was unhappy in her employment with Respondent, and that Davis might be better off out of the plant. He suggested to Respondent's counsel that Davis be offered 2 weeks severance pay. Garber was hospitalized and unable to testify in the present matter. Davis asserted that she had not given Garber permission to act on her behalf and didn't believe that he had done so. However, she testified that Garber had told her that he did not think it was wise that she return to work for Respondent, that he did not think it a good place to work. Davis decided that she would return for 60 days to see that Respondent carried out its obligation to post the Board's official notice pursuant to the settlement.

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Wage increases

It is also found, in accordance with Davis' testimony, that in June, after the Union activity began, Thomas Burns, Respondent's secretary, told the employees that Respondent had intended to give the employees a raise, "but now that the union is here no one can get a raise." Later, in mid-September, Thomas Burns told the employees that though many employees were asking for raises, Respondent could not give them now, but that very shortly, when the Blandon case was over, the employees would receive their raises. 3/ Respondent, in fact, decided toward the end of October (after the Blandon settlement) to give the employees an across-the-board increase, but withheld the increase until November 20, on the advice of its counsel that it should wait at least a month after the Blandon settlement.

There was clearly ill-feeling between Davis and Gianetti. Davis thought that Gianetti had improperly influenced the employees against the Union, and, as noted, had offered to fight with her. Davis also accused Gianetti of intimacy with Respondent's management.

So far as the record shows, two employees had asked for raises in the time period in question. Management avoided answering these inquiries.

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Davis' termination

In the first week of November, as set forth in more detail hereinafter, Respondent was particularly critical of Davis' performance on a job which she had never done before. Davis advised Respondent that she was going to file a charge with the Board. That weekend, she received an anonymous obscene telephone call, and on the following Monday, November 11, she called Respondent, stating that her nerves could no longer take the strain, and advised that she was quitting her employment. The next day, Respondent wrote acknowledging her resignation.

II. Alleged Harassment of Davis

A. Work Tasks

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Assignments are made in Respondent's operations on the basis of customer requirements, the availability of the employees and the skills required. When a job needs to be done, it is given to the next available employee with consideration as to whether the task requires skills beyond the employee's capability. Thus it appears that the employees are assigned a variety of tasks as the need arises. When the employee has not done the assigned task before, simple instructions are given at the time of the assignment. Once assigned, the employee is normally expected to continue with the required task until it is completed.

At the advent of the Union at Respondent's operations, Davis states she became aware of a change in the job tasks to which she was assigned. Some tasks, such as packing and printing, to which she was accustomed, were no longer assigned, or only rarely. She worked on milling machines and did assembly jobs which she had never done before, was assigned in the summer time to soldering operations at a soldering pot in the rear of the plant which generated very high temperatures, and was directed to perform certain cleaning operations under disagreeable conditions, neither of which had occurred previously.

The soldering operations

Hand soldering operations are performed toward the front of the plant. At the times material herein, there was a soldering pot at the middle of the plant, and another pot at the rear of the plant. The areas at the front of the plant and at the middle were better ventilated than the rear of the plant. The soldering pot at the rear of the plant generated the most heat and apparently was the more efficient of the soldering pots in the plant. Therefore, some jobs would normally be done at this location rather than at the pot in the middle of

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the plant or by hand soldering. Davis had performed soldering operations previously but not at the rear soldering pot.

As stated by Davis, ". . . in the hottest weather that was during the months of July and August when the temperature was at its highest, they were sending me to the rear . . . they would give me five hundred or one thousand coils to solder, which it was about 150°. No exhaust fan, one little window and I had to sit there with this sweat pouring off me and inhaling the fumes." Davis estimated that she was assigned to this work about 3 days a week, sometimes working 8 hours a day at the soldering pot. Some of the other employees also worked at this soldering pot in the rear during the summer time. Charlotte Dippel worked there for 3 days during this period. However, there is no credible evidence that any other employee worked there as much as Davis that summer. 4/ Thomas Burns, secretary of Respondent and in charge of production, told Davis that he had taken two employees off that work after a half an hour because they complained that they felt faint from the heat. Davis states that she complained, but Burns told her that someone had to do the work. Gianetti, in her testimony, referred to two other employees who had been relieved of this work upon complaint. It is clear that this operation is generally considered an undesirable task. However, Respondent's employee witnesses testified that they did not complain when assigned to this job.

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The cleaning operation

In September, Davis was assigned to perform a cleaning operation in a garage annex to the plant, which she had never done 30 before. The process involved the removal of a large number of transformers from a five gallon can in which they were immersed in a chemical, and cleaning them with a brush held in Davis' other hand. She performed this operation by sticking her arm into the can and pulling out the transformers one by one. She did this for 2 days. 35 During this period she complained to Thomas Burns concerning the heat from the ovens and the smell of the chemical. She was also concerned that the chemical would be harmful to her skin. The chemical dissolved some rubber gloves that she donned for the purpose and did irritate her arm. However, Burns assured her that the chemical 40 was not harmful. He apparently did not tell her that there were prongs nearby that she could use for the purpose. The record is convincing that other employees were also assigned to perform this same cleaning process. They seem to have used the prongs. One employee stated that Thomas Burns had instructed her to use them.

The winding operation

In the last week of Davis' employment, in the first week in November, Thomas Burns assigned Davis the task of winding wire around 500 coils. This was the first time she had performed this operation. Burns instructed Davis in the operation, but she had difficulty with the process because she is essentially left-handed. When Burns came over to her to complain that she wasn't doing the task well, Davis explained her difficulty to him, and told him she had never done this job before. Because Davis' production was slow, the next morning, Thomas Burns gave one-half of the remaining coils to another employee, Mary Rowe, to wind. The record shows that Rowe was very experienced at such winding operations. Later in the day, Burns confronted Davis with the coils which had been done by Rowe, saying, "How come you are not finished yet. How come, is the work too hard for you? If you cannot do it, maybe you don't belong working here." Davis again explained her problems with the operation and said that if Rowe could do the work faster, he should let her do it. Burns did not reply but continued to stand over Davis. Davis says that this made her nervous and she told Burns, in an insubordinate manner, in effect, that he should leave her alone and go talk to Catherine Gianetti.

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Burns' testimony concerning his purpose in creating this confrontation is something less than persuasive. He contended that it was customary for him to time one employee against another when it appeared that the first employee was extraordinarily slow. When asked on cross-examination whether he had done this to certain named employees, he replied in the affirmative. However, shortly thereafter, when asked for clarification, he first testified that he did not pick one girl to time against another, but then said he had done so with other employees in situations similar to that of Davis, but could not remember who these were without resort to his records. I do not credit Burns' testimony as to his reason for comparison timing of Davis on this occasion. It is manifest that Respondent does time new operations by observing several girls performing the task, to determine how long the task should take, in order to determine unit costs. This is for Respondent's records, not for comparison among the employees. It does not appear that the task assigned to Davis was a new operation and it is inferred that Respondent had previously timed the process. 5/

B. Tardiness

Davis asserts that after the advent of the Union, Respondent warned her about her tardiness and threatened to discharge her if she

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^{5/} Vincent Burns testified that Respondent had previously done considerable hand winding operations. In fact, Thomas Burns asserted that Davis had done the same job previously.

did not time in on time, whereas before the Union, Respondent condoned lateness and did not reprimand her. Respondent denies that she was reprimanded because of her Union activities, asserting that Davis had the worst record of tardiness of any employee from June until she left their employment in November. 6/ Respondent's records show, and Davis admits that she was frequently late during this period. Records were not submitted for a similar period prior to June, but the records for May do tend to show that Davis was similarly tardy in reporting for work before the inception of her Union activity.

III. Analysis and Conclusions

The wage increases. After the advent of the Union, Respondent told the employees that because "the union is here" wage raises Respondent had intended to grant would not be given. Later the employees were told that wage raises would not be granted during the pendency of the unfair labor practice proceeding instituted on behalf of employee Blandon but that they would be given when that case was over. After the settlement of the Blandon matter, Respondent, in November, granted an across-the-board increase. It has long been established that an employer may not withhold employee benefits merely because there is union activity at the plant. See McCormick Longmeadow Stone Co., Inc., 158 NLRB 1237; The Food Mart, 158 NLRB 1294. It is also clear that employees have a right to resort to the processes of the Board, and acts of reprisal against them because employees or their agents seek the protection of the Act constitutes interference, restraint and coercion of the employees in violation of the Act. See Nelson Manufacturing Co., 167 NLRB 101; Robertshaw Controls Co., 161 NLRB 103. For the reasons stated, Respondent's statements that wage increases were being withheld because of Union activities, and promises that wage raises would be forthcoming when the Union organization drive and the unfair labor practice proceeding were disposed of violated Section 8(a)(1) of the Act. However, I do not find that Respondent's action in granting the wage increase after the Blandon proceeding before the Board was concluded was in violation of the Act. Having found that Respondent intended to grant these increases, but illegally failed to put them into effect because of the employees' protected activities, I cannot find that Respondent also violated the Act by finally doing what it should have done in the first place. See Stumpf Motors Co., Inc., 208 NLRB No. 68; Dan Howard Mfg. Co., 158 NLRB 805. I shall therefore recommend that this allegation of the complaint be dismissed.

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^{6/} This is not strictly accurate. Respondent had at least two employees who had been permitted for some years to be late for work every day.

- 2. Inducement to quit. At the close of the Blandon matter before the Board, Respondent's counsel offered Davis severance pay to terminate her employment with Respondent and advised Davis that Respondent did not want her to continue work. However, this offer was tendered at the behest of the Union's representative, who informed counsel that Davis was unhappy at her work and that it would be in the best interest of Davis if she quit Respondent's employ. Under the circumstances, I find that this offer did not violate the Act and shall recommend that this allegation of the complaint be dismissed.
- 3. The constructive discharge. This issue which was extensively litigated (and is the only issue briefed by Respondent) has given me much concern. Davis clearly felt harassed by Respondent's work assignments and reprimands for tardiness after the inception of her Union activity. She had some basis for her feelings since she received assignments that she had never done before, to be performed under conditions that were oppressive, and at the end was subjected to an embarrassing, and rather unreasonable confrontation by Respondent in the shop in front of her fellow workers. In addition she seems to have received something less than sympathetic treatment from her employers.

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On the other hand, Davis' Union activity did not require Respondent to avoid giving her onerous or oppressive assignments so long as these assignments were not so unusual or abnormal as to indicate that she was being discriminatorily treated. Davis, and perhaps none of the other employees, had a normal or regular job in the plant which they were usually assigned, so that Davis' assignments cannot be said to be deviations from the normal pattern. Respondent's practice was to assign the required tasks to the available employees. On the present record it cannot be said that the tasks assigned to her did not need to be done, or that Respondent discriminatorily chose her to do the assigned jobs, which Respondent admittedly knew were not desirable jobs in the plant. Nor was Davis immune from criticism of her tardiness — which was excessive — merely because she had not been reprimanded in the past.

The circumstances are highly suspicious; that Davis should have been assigned to these undesirable jobs which she had never been required to do before just at this time; that Respondent should have been so unresponsive to her complaints when it apparently was more sympathetic and helpful to others; that Respondent should have picked just that period to upbraid her for tardiness; and particularly that Respondent should have provoked such a hostile, and somewhat childish confrontation with Davis in the last week of her employment. However, I do not think that these suspicions are enough to support General Counsel's complaint. On the basis of this record, I think Respondent had good grounds for disliking Davis quite apart from her Union

activity, which grounds undoubtedly accounted for much of Respondent's hostility to her, and I cannot fault Respondent, on the basis of the evidence here, for choosing Davis to perform the work in question which needed to be done. I also note that at the time Davis quit Respondent, she had admittedly decided that she would not continue her employment much longer in any event.

On the basis of the above, and the record as a whole, I find that Respondent did not discharge, or cause the constructive discharge of Rose Davis in violation of the Act, and shall recommend that this allegation of the complaint be dismissed.

IV. Conclusions of Law

- 1. The Respondent is an employer engaged in commerce within the meaning of Sections 2(6) and (7) of the Act.
 - 2. The Union is a labor organization within the meaning of Section 2(5) of the Act.
- 3. By advising its employees that wage increases were being withheld because of the pendency of the Union's organizational drive and the pendency of unfair labor practice proceedings and promising that such wage increases would be forthcoming when those activities were no longer pending, Respondent violated Section 8(a)(1) of the Act, which unfair labor practices affect commerce within the meaning of Sections 2(6) and 2(7) of the Act.
- 4. Respondent did not violate the Act by granting wage increases after the conclusion of the Union organizing drive and the settlement of the unfair labor practice proceedings, or by offering Rose Davis severance pay if she quit her employment with Respondent.

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5. Respondent did not discharge Rose Davis or cause her to be constructively discharged in violation of the Act.

V. The Remedy

It having been found that the Respondent has engaged in certain unfair labor practices in violation of Section 8(a)(1) of the Act, I shall recommend that it cease and desist therefrom and take certain affirmative action to effectuate the policies of the Act.

Upon the foregoing findings of fact, conclusions of law, and the entire record, and pursuant to Section 10(c) of the Act, I issue the following recommended: 7/

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ORDER

Caddell-Burns Mfg. Co., Inc., the Respondent herein, its officers, agents, successors, and assigns, shall:

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1. Cease and desist from:

- (a) Withholding increases in wages or other benefits from employees, or informing employees that such increases or benefits cannot be granted because a labor organization is attempting to organize or represent the employees or because employees or a labor organization has instituted proceedings before the National Labor Relations Board.
- (b) Promising or implying to its employees that they will receive wage increases or other benefits when attempts by a labor organization to organize or represent the employees cease, or when proceedings before the National Labor Relations Board are discontinued or concluded.
- (c) In any like or related manner interfering with the rights of employees guaranteed by Section 7 of the Act.
 - 2. Take the following affirmative action which will effectuate the policies of the Act:
 - (a) Post at its operations at Mineola, New York, copies of the attached notice marked "Appendix." 8/ Copies of said notice, on forms provided by the Regional Director for Region 29, after being duly signed by Respondent's authorized representative, shall be posted by it

7/ In the event no exceptions are filed as provided by Section 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Section 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order,

and all objections thereto shall be deemed waived for all purposes.

8/ In the event that the Board's Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall be changed to read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

- 11 -

immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to ensure that said notices are not altered, dafaced, or covered by any material.

(b) Notify the Regional Director for Region 29, in writing, within 20 days from the receipt of this Decision, what steps have been taken to comply therewith.

IT IS FURTHER ORDERED that the complaint in this matter be, and it hereby is dismissed as to any alleged violations of the Act not found hereinabove in this Decision.

Dated at Washington, D.C.

JL 23 1075

Sidney J. Barban Administrative Law Judge PETITIONER'S EXCEPTIONS

And MOTION FOR A REOPENING

OF THE RECORD

United States Of America Before The National Labor Relations Board Division Of Judges Washington, D. C. Caddell-Burns Mfg. Co. Inc.
And Case No. 29-CA-4088
Rose Davis, An Individual Rose Davis, An Individual Whose case no. 29-ca-4088 was before the Board. Request that a motion be granted for Re-hearing and also that a motion be granted to re-open the record, for the reasons specified in the Exceptions to administrative law judge's decision. Decision by Sidney J. Barban, Administrative Law Judge: Statement of the Case Findings and Conclusions Summary of tacts and Issues leged Harassment leged Inducement to Quit Vage Increases Davis's Termina

eged Harassment of Davis Work Tasks -Landiness . Landiness
. Analysis and Conclusions
The Wage Increases
Inducement to Quit
The Constructive Discharge

Rose Davis CASE 110, 29-CA-4088 380 front Street Hempstead. N.Y. Exceptions: to the Administrative Law Judges Decision

Page 3+ David Goldberg counsel for Respondent, "Credibly" testified, that on two or three occasions doing the hearing on the Blandon matter, Union representative Garber had spoken to him about Davis, Suggesting to Kespondent's Counsel that Davis be offered 2 lieeks severance pay to O leave her employment. TArgument Even though under Cross Examination, Counsel for Transmipt General Counsel, Steven Davis pages 357 ask, Respondents counse + 358 David Goldberg It

one was present at the time, the Transcript "Alleged" approach by Garber.

pages 57+ If any one seen Garber approach

358 him. His answer 10. Counsel also ask Respondent's counsel. If he told any one about such discussion with Garber, his answer again to counsel, My testimony was to the tacts, and also corroborated by Blandon, who testified that Goldberg raised the Issue of taking care of Davis, and also corroborated my testimony on October 17, 1974 in discussion with pages 146 -149 Goldberg in Chock full of Nuts Cafeteria. As for Union Representative Garber, Who gave a statement to General Counsel, "Unfortunate for me", He was hospitalized and unable to testify. No one information, that I should have an Attorney to represent me, and my hights. Counsel only told me, all I heeded is the truth, and the facts,

but obviously that wasn't enough. I have just found out, that Garber will be able to go back to work in September 1975. He requests to testify how that he is able, and to answer, Respondent's counsel David Goldberg's
Allegation. Also George Ibanez would
like to testify who is assistant to
Vice President Garber. It is my considered opinion that David Goldberg Respondent's Attorney whose "supposed to be a man of Law and also for the law, Should not tell (any one) about "Garbers approach" not even Sidney Burns, whom he represents is Inconceivable, Un less He, David Goldberg, acting on behalf of Sidney Burns Initiated such discussion. Paint 1 Jandiness pages 728 Respondent denies that I was reprimanded because of my Union Activities Asserting Iransport that I had the worst record pages 240- of Tardiness, and tha 263 was excessively late

of any employee.
Argument Those records was created, to make his honor, Judge Barban, see things there way. I have every pay stub, from the Very first week that I started work, at Caddell-Burns, to the Very last day. These pay stubs tell how many hours you have work. If a person was late, It would Show on the pay stub. We are due at work 7:55 A.D. but we have a 5 minute grace period. Transcript Vincent Burns testified that there pages 268- was no such grace period, 269 The Evidence described above was given to counse to be put on the record, but it heren Was. At the hearing after Vincent Burns testimony, at recess I Judge Barban, about my pay Stubs that they were evidence, and that those pay stubs could prove that Respondent's were lying. Judge Barbans reply was,

Its up to counsel to offered it, as evidence, I than told counsel, but it was never presented. Wage Increases: Analysis and Conclusions. page 4 The Wage Increases Argument Respondent herer intended to give across the board increases
Not until the Union appeared than they told the employees, that they were going to give them a haise, but how that the Union is here, they can not. That was the morning of June 5, 1979. From that clay on employees blamed he for not getting there haises. Inducement to Quit. Analysis and Conclusions "Argument".
How could Judge Barban Say!

However, this offer was tendered at the behest of the Union's pagog Representative, etc. etc.
There is NO Evidence, No facts,
Which support Respondent's counsel
David Gold Bergs Allegation. So how could they say Beyond a Regsonable that Union Representative Garber, Inititated such discussion. Point V The Constructive Discharge Analysis and Conclusions "Argument" have been working at Gaddell And Burns for over 13 months had hever any difficulties with Inanscript my Employers, or my fellow employees, or my work. It all started after the Union organizing page 383, driver I tried only to help my fellow-employees, to get them the benefits they deserved. But Gignetti in flyenced the employees by telling them that Unions we're no

good, and that Mr. Burns was going to fix up the place, the shop for them, making working conditions better, also there was the announcements of wage incheases. All these things were done to make the employees abandon the Union But What really did it, was the firing of Blandon, as I will put into more detail. Please read the bottom of page 3. Judge Barban saids; about the Supposed threats that I was Suppose to make, Respondents said Thave slapped an employee, Thave denied it, But the Judge Saids, even though I denied it, He's inclined to believe that, duling an excited discussion on June 4, that Davis did offer to Slap one employees face but did Argument" In June 4th there was no Such discussion, On June the 4" Blandon Was fired. Tyne the 5th after I came

back from lunch, some of the employees confronted me, They ask me for the cards that they have Transcript Sign. I told them, I did not have pages 28 the cards, that the Union had the saying they wanted there votes 508 back. I told them, the employees to either see the union men, or call up the Labor Board. There was no respond. They just Kept on saying that they need there job, they can't afford to loose. There job. Thats when I told them, what I thought of them. 12994, 511 I can't see the difference, whether I was, going back to work for 30 days, 60 days, or 100 days, the fact is I didn't even get the chance to stay, 16 days. The facts are very clear that Respondents maliciously plan to get me to leave my employment, bringing me to the breaking point, for Respondents Knew very well money wouldn't do it, that money would not make me leave my employment.

It was a very cruel thing to do, to one human being. So I ask each and every one of you, to consider all of the facts, very carefully as a whole, and I hope you will make the right decision.

Respectfully Submitted,

Rose Davis

Rose Davis, An Individual

Lo John C. Truescale Executive Secretary

Caddell-Byrns Mfg. Co. Inc.

David Goldberg, Esq.

Steven Davis Counsel For The General Counsel

PETITIONER'S MOTION FOR REHEARING

I

Rose Davis 380 Front Street Hempstead, N.Y.

Before The National Labor Relations Board

Caddell-Byrns Mfg., Co.
And Case No. 29-CA-4088
Rose Davis, An Individual

I Rose Davis, An Individual, whose case was before the Board, case no. 29-ca-4088. Request that a motion be granted for Rehearing. I will

specify the error, and the prejudice that resulted, from such an error. See Decision by Sidney J. Barban. pages 3+4 See Alleged Inducement To Quit
Analysis And Conclusions Inducement To Quit Question Why did Judge Barban state
That Respondent's counsel
David Goldberg "Credibly" testified. Answer 1. Was it because he believed in what, Respondent's counsel had said, 2 or was it because Respondents counsel, is an Attorney, and can

Transcript Even though Respondent's counsel pages 57+ had no facts, or evidence, Judge 358 Barban took his word, and not my word, Is that what the Judge based his conclusions on, Respondent's Counsel's word? Transcript My testimony was to the facts and pages 146 to corroborated by Blandon, and would 149 of also been confirmed, by Union Representative Garber, if he hadn't been hospitalized. But my testimony was held in disnegard, regardless of what the facts were. For this reason, among others, I will have to be very persistent, that a motion be granted for Rehearing, so that all of the facts, and evidence will be stated, clearly, and without any further prejudiced. Respectfully Submitted, To John C. Invesdale Executive Secretary Caddell-Burns Mfg, Co., Pose Davis David Goldberg Esq. Steven Davis Esq. Rose Davis, An Individual Counsel for the General Counsel

GENERAL COUNSEL'S EXCEPTIONS AND BRIEF

UNITED STATES OF AMERICA BEFORE THE MATIONAL LABOR RELATIONS BOARD REGION 29

CADDELL-BURNS MFG. CO.INC.

and

Case No. 29-CA-4088

ROSE DAVIS, An Individual

GENERAL COURSEL'S EXCEPTIONS
TO THE DECISION OF THE AUMINISTRATIVE
LAW JUDGE
AND BRIEF IN SUPPORT THERMOR

Steven Davis
Counsel for the General Counsel
National Labor Relations Board
Region 29
16 Court Street
Brooklyn, New York 11241

INITIAL STATEMENT

Administrative Law Judge Sidney J. Barban issued, on July 23, 1975, his Decision wherein he dismissed that part of the Complaint which alleged, inter alia, that Respondent, Caddell-Burns Mfg. Co., Inc., violated Section 8(a)(1) and (3) of the Act by:

- l. Assigning its employee Rose Davis, herein called Davis, to more arduous job tasks, thereby forcing her to quit her employment;
 - 2. Constructively discharging Davis;
- 3. Offering severance pay to employees to induce them to quit their employment; and
- 4. Granting wage increases to employees at the conclusion of a union organizing drive, conducted by International Industrial Production Employees Union, herein called the Union.

The Judge found that Respondent violated Section 8(a)(1) of the Act by:

- 1. Advising its employees that wage increases were being withheld because of the pendency of the Union's drive and unfair labor practice proceedings, and
- 2. Promising its employees that such wage increases would be forthcoming when the : Union drive and proceedings were not pending.

While the General Counsel respectfully urges the Board to adopt the findings, recommendations and conclusions of the Administrative Law Judge to which General Counsel takes no exceptions, since these recommendations, conclusions and findings are supported by a preponderance of the evidence, he further respectfully urges the Board to correct

the Administrative Law Judge's recommendations, conclusions and findings as to his dismissal of the allegations of the Complaint set forth in the Exceptions, infra.

The General Counsel also respectfully urges the Board to modify portions of the Administrative Law Judge's recommended Order to which he excepts and to affirm the remainder of his Decision. The General Counsel takes the following specific exceptions and submits in addition a Brief in Support of Exceptions.

EXCEPTIONS

- 1. The Administrative Law Judge erred in recommending dismissal of the allegations of the Complaint involving the assignment of Davis to more arduous job tasks, thereby forcing her to quit her employment. (ALJD, p. 10, 1. 34-35)
- 2. The Administrative Law Judge erred in failing to find in support of the Complaint allegation of the assignment of Davis to more arduous job tasks, thereby forcing her to quit her employment. (ALJD, p. 10)
- 3. The Administrative Law Judge erred in failing to provide a remedy in support of the Complaint allegation of the assignment of Davis to more arduous job tasks, thereby forcing her to quit her employment. (ALJD, p. 10)

4. The Administrative Law Judge erred in failing to make recommendations in a proposed Order and Notice as to the Complaint allegation of the assignment of Davis to more arduous job tasks, thereby forcing her to quit her employment. (ALJD, p. 11)

5. The Administrative Law Judge erred in recommending dismissal of the allegations of the Complaint involving the constructive discharge of Davis. (ALJD, p. 10, 1. 34-35)

^{1.} Transcript references are designated as "Tr_"; References to subjoits are designated as "GO Ex_" and "R Ex_". References to the Administrative Law Judge's Decision are designated as "ALJD_" Appropriate page and line designations follow.

6. The Administrative Law Judge erred in failing to find in support of the Complaint allegations of the constructive discharge of Davis. (ALJD p. 10)

7. The Administrative Law Judge erred in failing to provide a remedy in support of the Complaint allegations of the constructive discharge of Davis. (ALJD p. 10)

(8.) The Administrative Law Judge erred in failing to make recommendations in a proposed Order and Notice as to the Complaint allegations of the constructive discharge of Davis. (ALJD p. 11)

9. The Administrative Law Judge erred in recommending dismissal of the allegations of the Complaint involving the offer of severance pay to employees. (ALJD p. 10, 1.31-32)

10. The Administrative Law Judge erred in failing to find in support of the Complaint allegations of the offer of severance pay to employees. (ALJD, p. 10)

11. The Administrative Law Judge erred in failing to

provide a remedy in support of the Complaint allegations involving the offer of severance pay to employees. (ALJD, p. 10)

12. The Administrative Law Judge erred in failing to make recommendations in a proposed Order and Notice as to the Complaint allegations of the offer of severance pay to employees. (ALJD, p. 11)

13. The Administrative Law Judge erred in recommending dismissal of the allegations of the Complaint involving the granting of wage increases to employees. (ALJD, p. 10, 1.29-30)

14. The Administrative Law Judge erred in failing to find in support of the Complaint allegations of the granting of wage increases to employees. (ALJD, p. 10)

15. The Administrative Law Judge erred in failing to provide a remedy in support of the Complaint allegations

16. The Administrative Law Judge erred in failing to make recommendations in a proposed Order and Notice as to the Complaint allegations of granting of wage increases to employees. (ALJD, p. 11)

BRIEF IN SUPPORT OF EXCEPTIONS TO DECISION OF THE ADMINISTRATIVE LAW JUDGE

STATEMENT OF THE FACTS

Judge Barban credited Davis' version of the facts (ALJD, p. 2, 1.26) and observed that she had notified Respondent that she had contacted the Union and was responsible for its organizing drive at the Respondent's plant. She thus made Respondent aware that it was her, and not fellow employee Blandon who had initiated the Union's campaign. Blandon had been discharged on the day after the Union drive began. (ALJD, p. 2, 1.40-41)

Davis testified, and the Judge found, that when the Union's aborted drive ended, Davis was assigned job tasks "that were oppressive, unpleasant and disagreeable ..." (ALJD, p. 3, 1. 10-12, p. 9, 1. 17, 38) and that Respondent was "unresponsive to her complaints when it was more sympathetic and helpful to others" (ALJD, p.9,1.40-41) and further found that Davis was assigned to tasks which she never previously performed. (ALJD, p. 5, 1. 32-33)

Such tasks, as found by the Judge, involved working at a soldering pot at the rear of the plant in which area the heat from the pot was extremely intense. The Judge found that no other employee worked there as such as Davis. (ALJD, P. 8, 1, 13-15) and that other employees who had complained of that assignment had been reassigned. (ALJD p.6,1.19

Another task involved the assignment of Davis to a cleaning operation which required her to dip her hands into a harmful, irritating cleaning solution. That chemical dissolved rubber ghoves which she wore and also irritated her skin. (ALJD p. 6, 1. 30-39) Despite her complaints as to this work, Respondent refused to reassign her.

. In addition, Davis testified, and the Judge found that when Davis appeared as a witness for the General Counsel at the Blandon hearing, Respondent's attorney offered her severance pay if she would quit her employment. (ALJD, p. 3, 1. 33-35)

ARGUMENT

Judge Barban was admittedly bothered about the "suspicious circumstances" relating to Davis' working conditions and treatment by Respondent. (ALJD, p. 9, 1. 12-15, 37-44) However, the only conclusion which may properly

be drawm (and which the Judge failed to draw) is that Davis was constructively discharged. As discussed above, she was given oppressive job assignments which were to be performed under very trying working conditions.

The Judge's conclusion that Davis was assigned to those tasks because Respondent disliked her personally may well be true - but the reason it disliked her was because of her aggressive and prominent role in the Union's organizational campaign.

This argument is supported by the fact that Respondent offered Davis money, at the Blandon hearing, to induce Davis to quit. It shught thereby to "clear house" of the leading Unbon adherent. Union agent Leo Garber did not raise the issue of paying Davis to quit, as is clear

from Davis' denials. Assuming, arguends, that Garber did suggest to Respondent's attorney that it pay Davis to quit, Respondent need not have acted on that suggestion, but instead should have been outraged that it was being asked to pay an employee (who was a General Counsel witness at a hearing involving the discharge of another employee) to quit her employment. Rather, Respondent sought, at first by the direct means of a money offer to induce Davis to quit. When that was unseccessful, it sought to induce her to quit by job harrassmet.

It was successful in its latter attempt - the final blow being struck on Davis' last week of employment when as found by the Judge, the Respondent provoked a hostile and childish confrontation with Davis. (ALJD p. 9, 1.43-44)

CONCLUSION

Counsel for the General Counsel respectfully states that as to the exceptions to which this Brief are addressed, it is clear that the findings and conclusions of the Judge as to the allegations of the Complaint which he dismissed, are erroneous.

Respectfully submitted

Stever Davis

Steven Davis

Counsel for the General Counsel National Labor Relations Board Region 29

16 Court Street

Brooklyn, W.Y. 11241

TO:

John C. Fruesdale, Executive Secretary National Labor Relations Board Washington, D.C.

Caddell-Turns Hig. Co., Inc.

David Bolibers, Esq.

Rose Davis

NATIONAL LABOR RELATIONS BOARD DECISION

D-827 Mineola, N.Y.

UNITED STATES OF AMERICA

BEFORE THE NATIONAL LABOR RELATIONS BOARD

CADDELL-BURNS MFG. CO., INC.

and

Case 29-CA-4088

KUSE DAVIS, an Individual

DECISION AND ORDER

On July 23, 1975, Administrative Law Judge Sidney J. Barban issued the attached Decision in this proceeding. Thereafter, the General Counsel and the Charging Party filed exceptions and supporting briefs, and the Charging Party filed a motion for rehearing. The Respondent filed a brief in support of the Administrative Law Judge's Decision.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Decision in light of the exceptions and briefs and has decided to affirm the rulings, findings, and conclusions of the Administrative Law Judge and to adopt his recommended Order.

^{1/} The Charging Party's motions for a rehearing and for a reopening of the record "so that all of the facts, and evidence will be stated, clearly, and without any further prejudice" are hereby denied as lacking in merit.

^{2/} The General Counsel and the Charging Party have excepted to certain credibility findings made by the Administrative Law Judge. It is the Board's established policy not to overrule an Administrative Law Judge's resolutions with respect to credibility unless the clear preponderance of all of the relevant evidence convinces us that the resolutions are incorrect. Standard Dry Wall Products, Inc., 91 NLRB 544 (1960), enfd. 188 F.2d 362 (C.A. 3, 1951). We have carefully examined the record and find no basis for reversing his findings.

We agree with the Administrative Law Judge that the record does not warrant

e conclusion that the Respondent constructively discharged Rose Davis. Our

dissenting colleague relies on what the Administrative Law Judge labeled

"suspicious circumstances" for his finding that she was constructively discharged.

The Board will not, however, infer from "suspicious circumstances" alone that

an employer has unlawfully forced an employee to resign.

While it is true that Davis was, from time to time, assigned undesirable jobs, the record shows that such assignments were made to all employees on a rotating basis. Thus, Respondent's other employees had at one time or another performed these tasks. There is nothing in the record which would show that Davis was unlawfully singled out.

Nor can we conclude, as does our dissenting colleague, that Respondent's offer of severance pay to Davis supports a finding of constructive discharge. Although he concedes that this offer was motivated by the urging of a union presentative, our colleague nevertheless states that Respondent's willingness to comply with the union representative's request suggests a discriminatory purpose. We find that such an inference is unwarranted, particularly in light of evidence that Respondent had legitimate grounds for disliking Davis which would lawfully prompt an offer of severance pay. Thus, the record shows that Davis alienated her fellow employees, threatened to slap one employee's face, offered to fight with a longtime employee who was sympathetic to management, and made uncomplimentary remarks about members of management. Moreover, it is significant that the offer was made only after the Union suggested that Davis was unhappy at her job and that it would be in her best interest to leave respondent's employ. The fact that the offer was made in response to union entreaties adds to the legitimacy of Respondent's motivation.

4

excess," our dissenting colleague merely reiterates his thesis that Respondent's actions were "highly suspicious" and therefore ipso facto indicative of an alawful motivation. We find that the actions of Respondent which are cited by our colleague for their "suspicious" nature never rise to the level of concrete evidence which would establish a prima facie case of constructive discharge. Accordingly, we agree with the Administrative Law Judge that Respondent did not constructively discharge Rose Davis.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge and hereby orders that the Respondent, Caddell-Burns Mfg. Co., Inc., Mineola, New York, its officers, agents, successors, and assigns, shall take the action set forth in the said recommended Order.

Dated, Washington, D.C. JAN 20 1976

Betty Southard Hurphy, Chairman

John A. Penello.

Member

(SEAL)

NATIONAL LABOR RELATIONS BOARD

MEMBER JENKINS, concurring in part and dissenting in part:

I agree with my colleagues that Respondent violated Section 8(a)(1) by stating that wage increases were being withheld because of union activities and by conditioning wage increases upon an end to the union organizational drive and conclusion of the unfair labor practice proceeding on behalf of employee Loretta Blandon.

However, unlike my colleagues, I also find compelling evidence that
Kespondent further retaliated against its employees' union activities by ridding
itself of the leading proponent of such protected activities, employee Rose Davis,
in violation of Section 8(a)(3) of the Act. Thus, it is abundantly clear that
not only did Respondent openly solicit Davis' resignation but also from that
moment, on June 3, when Davis and Blandon (who was discharged the very next day)
made known their union interests until her forced termination in November, Davis
was subjected to harassment and intimidation because, as the Administrative
Law Judge found, Respondent "did not want her 'there.'" Indeed, my colleagues
readily agree that

The circumstances are highly suspicious; that Davis should have been assigned to ["onerous," "oppressive" and generally] undesirable jobs which she had never been required to do before just at this time; that Respondent should have been so unresponsive to her complaints when it apparently was more sympathetic and helpful to others; that Respondent should have picked just that period to upbraid her for tardiness; and particularly that Respondent should have provoked such a hostile ["embarrassing," "unreasonable"] and somewhat childish confrontation with Davis in the last week of her employment.

Moreover, neither my colleagues nor I can ignore that this patent "hostility" towards Davis was accompanied by a warning from one of the Respondent's officers that "maybe you don't belong working here." And most revealing is Respondent's admission that when Davis appeared as a prospective witness for the General

Counsel at Blandon's unfair labor practice hearing in mid-October the Respondent, through its attorney, offered Davis severance pay if she quit. While it appears that the union representative on his own broached the subject, as a possible alternative to the harassment of Davis, the Respondent was more than willing to participate in a discussion of "what it will take for [Davis] not to go back to work" because, as found, the Respondent did "not want her to continue work." Indeed, although Davis spurned the offer relayed by Respondent's attorney, Supervisor Geanetti—in the presence of Respondent's president—told Davis that she was not wanted back at work.

As the Administrative Law Judge found, throughout this period, from June until her termination in November, Davis was the union "militant" in the plant. Clearly, Davis' union advocacy, persistence in the face of both "oppressive" job assignments and "embarrassing" confrontations, refusal to accept an attractive offer to "take care" of her if she quit, and, finally, her announcement to file the instant unfair labor practice charges in response to the Respondent's continuing harassment and Burns' "unreasonable" and "embarrassing" provocation on November 7, were a continuing source of irritation to the Respondent. Respondent had, inter alia, threatened anxious employees that as long as "the union is here no one can get a raise." An across—the—board increase was implemented on November 20.

In view of the foregoing, I find that the General Counsel has established a <u>prima facie</u> case of constructive discharge. Respondent's union animus is sufficiently displayed by its threat to deny wage increases while "the union is here"; and that this animus extended to its termination of Davis is clear from its offer of severance pay to get her to quit when she appeared as a prospective

witness against Respondent at Blandon's alleged unlawful discharge hearing. In

view it is no defense to argue that Davis was not "immune" from criticism, or
that she was expected to perform work "which needed to be done." For the record
shows that the Respondent exercised its prerogatives to unreasonable excess—which

ven my colleagues find "highly suspicious." Nor do I believe that they and the
Administrative Law Judge have successfully disentangled those unspecified "good
grounds for disliking Davis" from the antiunion considerations, especially since
the worst that could be said about her was that she was "not one of our best
employees." Finally, her discharge is hardly made any less unlawful because, after
settlement of the Blandon case, Davis decided to remain in the Respondent's employ
at least until the Respondent carried out its legal obligation to post our
official notice pursuant to that settlement. For the issue here is not the reason
for Davis' staying, but rather the reason for the hostility which forced her to
quit.

Dated, Washington, D.C. JAN 201976

Howard Jenkins, Jr., Member
NATIONAL LABOR RELATIONS BOARD

SWORN TESTIMONY OF DAVID GOLDBERG TRANSCRIP PAGE'S 351-362

	1	A Yes, I think everyone knew.
(2	Q Did any other girls ever speak to you about the
	3	existence of the tongs?
(4	A The what?
	5	Q Did any other girls in the shop ever speak to you
	6	about their existence?
	7	A No. I have seen others use it.
	8	MR. HENRY GOLDBERG: I have no further questions of
	9	this witness;
	10	MR. DAVIS: No further questions.
	11	JUDGE BARRAN: You are excused. Thank you very much.
	12	Call your next witness.
(13	MR. HENRY GOLDBERG: I would like to call as my next
	14	witness Mr. David Goldberg.
	15	Whereupon,
	16	DAVID GOLDBERG
	17	was called as a witness, and having been first duly sworn
	18	by Judge Barban, testified as follows:
	19	DIRECT EXAMINATION
	20	Q (By Mr. Henry Goldberg) Will you please state
	21	your name and address and occupation?
(22	A David Goldberg, 999 Central Avenue, Woodmere, New
	23	York. I'm an attorney for Caddell-Burns.
(24	Q Mr. Goldberg, are you familiar with Paragraph 6 B
	25	of the Complaint in the present case as amended?
		CSA Reporting

1	A Yes, I am familiar with it.
2	Q Do you need a copy of the Complaint to refresh your
3	memory?
4	A No, I know it.
5	Q In your own words I wonder if you could tell us what
6	transpired at thetime indicated in the allegations of that
7	Complaint?
8	A Is it George Garber G-a-r-b-e-r?
9	Q Leo Garber.
10	A Leo Garber, the trade union official who was the
11	moving organizer of this plant approached me at the hearing
12	and in other places suggesting that we resolve the employment
13	of Rose Davis, and I was noncommital one given day, and
14	it was the last day of the hearing.
15	Q Before you go on, you say he approached you?
16	A Yes.
17	Q Was this on one occasion in particular?
18	A The actual picture as far as I can recollect, was
19	quite informal.
20	He indicated that Ms. Davis was very unhappy in the
21	plant and that he felt that we he didn't commit, it was
, 22	we, as the company might offer her a severance wage.
23	I told him that I had never discussed it with the
24	company or had they with me and we just left it at that
25	until one given day and whatever day that might have been,
	CSA Reporting

		1	I think it was the last day of the hearing involving Mrs
(7	2	Q Loretta Blandon.
		3	A Miss Loretta Blandon. It was about five o'clock in
(4	the afternoon in the room, not the hearing room, but an
		5	adjacent room I believe it was.
		6	He approached me again.
		7	Q Who is he?
		8	A Mr. Leo Garber.
		9	Q Was he alone?
		10	A He was with Mr. Ibanez and again suggested, and this
		11	is done very laconically, not with any just come over
		12	and say look the way it went as I remember "Look,
(13	Dave, perhaps we could just ajust the matter of Mrs. Davis."
		14	And he suggested that she be given a two week pay
		15	severance wage.
		16	Ms. Davis who was in the room or approached the
		17	room so far as I can recollect was not in favor of that
		18	at all and that is how it was left.
		19	The other person in the room so far as I know
		20	Q Before you go on, Mr. Goldberg, she was not in favor
		21	of that amount or she wasn't in favor of the discussion?
(22	A Well, I can't say. I was referring to the amount.
		23	I wasn't referring to her general attitude about
(_		24	this. I doit know what that might have been.
	•	25	The whole thing was a short cursury thing.
			CSA Reporting

I at no time imagined that anyone would assume that we would propose this in the Board's offices in the middle of another hearing, totally unrelated to the problem we were facing.

I was really being gracious to Mr. Garber who had been courteous to me.

MR. DAVID GOLDBERG: I have no further questions.

CROSS EXAMINATION

Q (By Mr. Davis) Mr. Goldberg, you testified that you were in another room with Mr. Garber; is that right?

A Well no, I was in another room and Mr. Garber entered the room. I was -- Mr. Sidney Burns was there as well and we were discussing whatever and Mr. Garber approached with Mr. Ibanez and said, very imformal, said "Let us take care of Rose Davis" or whatever, in that

vein anyway, I'm not quoting him exactly, and that is how --

Q When did he do it before?

and he had done this before.

A During the period -- we were here for many hours walking around this place, during the rest periods and breaks and lunch and whatever.

Q When was the first time that Mr. Garber approached you by phone or in person regarding taking care of Rose Davis?

A It wasn't any other place but this place.

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(Q He didn't call you before?
,	, 2	A Not to my recollection at all.
(3	Q So the first time was at the Board hearing?
	4	A Right, right in this place, within these confines
	5	of this outside room and these offices.
	6	JUDGE BARBAN: That would be in the foyer-entering
	7	into this hearing room and entering into the hearing rooms
	8	adjacent. Go ahead.
	9	Q What did he say the first time that he spoke to you
	. 10	about the matter?
	11	A He alluded to Mrs. Davis and indicated she was very
	12	
(13	unhappy and might be better out of the plant and suggested
	14	that we give her severance rate the first time he spoke to
	15	me about it.
	16	I just didn't respond. I just walked away. It
	17	made no sense at all in this office to discuss this with me.
	18	Q Was this the first day of the hearing?
	19	A I don't know which day it was.
		Q Can you recall what time of the day that was?
	20	A No, I couldn't, truly couldn't.
	21	Q Could it have been at 5 o'clock at night the first
(22	day?
	23	A It could have been as well. I really don't know.
(24	Q How many times did you engage in discussion about
	25	this matter?
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	1	A Really never engaged him. I was always he who
	2	engaged me.
	3	Q How many times did you discuss it with him?
	4.	A I would say two or three times. We didn't discuss
	5	it. He approached me with this. I said nothing to him.
	6	Q The first time he said what you just testified "How
	7	about giving her two weeks severance pay"; is that right?
	8	A That wasn't the first time.
	9	Q Tell us what the first time was.
	10	A The first time he didn't elude to any money, he
	11	merely said "We ought let us take care of Rose Davis".
	12	I tell you, if I recollect it exactly Mrs. Davis
(13	was not present during any of his approaches to me.
	14	Just came over informally to me and addressed me
	15	that way in a very friendly fashion trying to be helpful.
	16	Q The first time he spoke to you you don't recall
	17	where you spoke to him except that it was on this floor
	18	in the areas that we have discussed; is that right?
	19	A That is the extent of my recollection.
	20	Q What did you reply to him when he said that the
	21	first time?
(22	A I don't think I really
	23	MR. HENRY GOLDBERG: That was already asked and
	24	answered. Just a moment.
	25	THE WITNESS: I made no comment. I just looked at

		il	
		1	him.
	>	2	Q Did you report what he said to Mr. Burns?
		3	A No.
		4	Q You didn't ask him will he check with Ms. Davis
		5	before making this offer?
		6	A The answer is most emphatically not. I said so
		7	before.
		8	MR. HENRY GOLDBERG: Read back the last question,
		9	I'm sorry.
•		10	(Whereupon the last question was read by the
		11	Reporter.)
		12	MR. HENRY GODBERG: What offer? I object to that
(13	question?
		14	JUDGE BARBAN: Look, Mr. Goldberg I read the record
		15	as a whole. I think I understand. In that context we
		16	have the witness' testimony that Mr. Garber came to him
		17	with a proposition that something should be done concerning
		18	Mrs. Davis.
		19	MR. HENRY GOLDBERG: That is all I wanted to know.
		20	You are referring to Mr. Garber's offer.
		21	MR. DAVIS: That's right.
(22	MR. HENRY GOLDBERG: Thank you.
		23	Q Was anyone present the first time you spoke with
(24	Mr. Garber about this?
	0	25	A Mr. Davis, you are establishing a wrong twist to
			CSA Reporting

	this.	
	2	I said he approached me. I didn't speak to him at
	3 all. I	just made no comment about it.
	4	No one was with him as far as I know.
	5 Q	No one was around that could have heard what he said?
•	6 A	Not to my knowledge, no.
	7 Q	How long after was the second conversation with Mr.
	8 Garber	?
	³ A	I couldn't really say, I don't remember.
	.0 Q	The first day or the second day, if you remember?
	1 A	I don't think I think it was probably the second
	1	the hearing but I really can't say that with any
1	degree	of certainty.
1.	· Q	What was said at that time?
	5 A	Virtually the same thing, that Mrs. Davis "What
1	11	going to do about Mrs. Davis?"
1	Q	What did you reply?
1	A	I made no reply to him.
2	Q	Was anyone there present who could have heard that?
2	A	Anyone who could have heard was Mr. Ibanez.
2	Q	And you just walked away then?
2:	A	Discussed something else with him. He had
24	Q	That matter never came up again at that time?
2	A	At that point, no.
• *	Q	Did you report at that time to Mr. Burns what was
		CSA Reporting
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said?

No, I didn't discuss it with Mr. Burns. I did take it up with Henry and discussed, told him my son Henry, that Mr. Garber was speaking, had alluded twice to Mrs. Davis.

I don't think anyone else.

When was the third conversation or when did he speak 0 with you the third time?

I think the last instance was the one that took place as I indicated before which I previoulsy testified to.

What happened at that point? Q

I just indicated that he -- I was in this room, I don't remember what room it was in fact, on the floor with Mr. Sidney Burns, Mr. Henry Goldberg and Mr. Garber and Mr. Ibanez.

If I remember correctly the matter was of no importance to me until I found the charge.

MR. Garber and Mr. Ibanez came and I don't know whether Mrs. Davis was with them at the moment or came subsequently.

But she did join you?

She came over to where we were standing, yes. AC

How did the conversation open and what was said at that time?

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A Same thing again, Mr. Garber said Mrs. -- he began -- he again alluded to Mrs. Davis as being unhappy and let us settle all the matters so to speak, that type of approach.

I told them that -- he said how about giving her two weeks severance? If I recollect Mrs. Davis was not enthralled with that at all. She was within earshot.

- Q What did Mr. Burns say about that?
- A Mr. Burns made no comment at all.
- Q Did you discuss it privately with Mr. Burns?
- A Subsequantly?
- Q Privately?
- A We didn't discuss it that afternoon at all, no.
- Q What did you reply to Mr. Garber what he said how about two weeks?
- A I can't really recollect what I said to him, candidly, I don't have any recollection except that I think Mrs. Davis took the whole thing out of his hands by being very incensed at his suggestion.
- Q Were you agreeable to the two weeks offer?
- A I can't say really because the matter was -- the door was shut on it by Mrs. Davis' vehement refusal to consider what Garber was doing for her.
- Q Were you surprised that the union would ask you; not the company to obligate itself to pay money when it

didn't have to pay any money at all to Mrs. Davis?

A I don't know what relationship there exists between Mr. Garber and Mrs. Davis or why he would do this or whether she was authorizing or whatever.

What was your attitude and the company's attitude to this request to pay her for money when she wasn't entitled to it?

MR. HENRY GOLDBERG: Objection?

JUDGE BARBAN: Sustained.

MR. DAVIS: Your Honor, I think this is important.
We have here a situation --

MR. HENRY GOLDBERG: We have a ruling. You can't give a reason after a ruling.

JUDGE BARBAN: Counsel, if counsel can convince me
I will change my ruling.

MR. DAVIS: Judge, I think it is important. We have an agent and attorney of a company who is presented with this offer of the union and I think it is important to this case to determine what his attitude was in relation to hearing this offer made.

MR. HENRY GOLDBERG: Your Honor, their reaction after the fact, their response to this unconventional and unorthodox behavior on the part of the union, probably in good faith, but probably an orthodox behavior on the part of the union after the fact is really not relevant after

any argument.

JUDGE BARBAN: I think you two gentlemen are maybe not talking about the same thing.

Mr. Davis, I'm interested in finding out what was done and what was said but why is it material that I find out what the witness thought about it?

Suppose he says "I didn't give any thought to it at all?" Would it make any difference?

Suppose he said "I was horrified". Would it make any difference?

MR. DAVIS: It goes to credibility. I think it should make a difference because I think the logical reaction should be that an employer should be outraged that a company is being asked to entertain an idea of giving an employee money, still employed, in settlement on a matter that has never been brought if the employer was acting in good faith in these discussions.

JUDGE BARBAN: I think I am right, Mr. Davis. I am going to sustain the objection.

MR. DAVIS: No further questions.

JUDGE BARBAN: Any redirect?

MR. HENRY GOLDBERG: No.

JUDGE BARBAN: You are excused. Thank you very much.

MR. HENRY GOLDBERG: I would call my next witness

CSA Reporting

TESTIMONY OF THOMAS BURNS
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,	1	Q Do you know what the phrase time and motion study
	2	means?
	3	A Explain it, please.
	• 4	JUDGE BARBAN: Mr. Davis, it is unnecessary. The
	. 5	witness obviously hasn't taken any formal training in
	6	time and motion.
	7	Q You testified that you compared Mrs. Davis' work
	8	on a particulanoccasion, her performance of a particular
	9	job with that of yourself, your father, your brother and
	. 10	the floor sweeper; is that correct?
	11	A No, that is not correct.
,	:2	2 Could you tell us what your testimony is concerning
(O 13	that?
	14	A I included two of the other women also.
	15	Q Two of the other women?
	16	A Yes.
	17	Q And your conclusion was that Mrs. Davis performed
	18	her work slower than any of these people?
	19	A Correct.
	20	Q Did you warn her about it and tell her this was
	21	your conclusion?
(22	A Yes, I did.
	23	Q What did she say?
	24	A Something to the effect that it was the best she
1		1 d do

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	1	A Almost all the other employees.
	2	Q Catherine Gionetti?
0,	3	A No.
	4	Q Mary Rowe?
•	5	A Yes.
	6	Q Ann Spinella?
	7	A Yes.
	8	Q Mary Rowe?
	9	A You said that already.
	10	MR. HENRY GOLDBERG: You just asked.
	. 11	Q Charlotte Dippel?
	12	A Yes.
	1.3	MR. HENRY GOLDBERG: Could we hold up a minute here?
	14	I would like to get those names down.
	15	MR. DAVIS: The people in the hearing room.
	16	MR. HENRY GOLDBERG: Charlotte, Mary
	17	JUDGE BARBAN: Do you want the court reporter to read
	18	it back?
	19	MR. HENRY GOLDBERG: One more time to save time.
	20	Thank you very much.
	21	Q When did you engage in that procedure with regard
(22	to those employees' work?
	23	A I have no specific dates.
	24	Q But you are certain that with each of the people
	25	you mentioned you yourself did a particular job, the same

job that employee was doing, your father, your brother, 1 two other employees and a floor sweeper? 2 3 No. A Who did those comparisons? Who did you have do the particular work that the employees did? 5 The employees themselves I compared one employee 6 with the other. 7 Q So you never used the whole management team as a 8 basis of comparison with any of those employees you 9 mentioned; is that true? 10 Correct. 11 Q You testified that you decided who does a job 12 by who is available at the time and who can do the job? 13 Is that right? 14 Correct. 15 Now, did you ever assign Mrs. Davis to work in the 16 solder pot area in the back? 17 18 Yes. In July, August, 1974? 19 20 Yes. A Do you recall those specific instances that you 21 assigned her those jobs? 22 No, I don't. Would you recall who else was available to do 24 what jobs at those times? 25